

REFERENCE MANUAL 41: WILDERNESS STEWARDSHIP

Extent Necessary Determination Process for Commercial Services

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Recommendation and Approval for Inclusion in Reference Manual 41

Recommended by the WASO Wilderness Stewardship Division:

Signature: _____

Title: Wilderness Stewardship Division Program Manager

Approval for inclusion in Reference Manual 41 by WASO Visitor and Resource Protection:

Signature: _____

Title: Associate Director, Visitor and Resource Protection

SECTION 1: BACKGROUND AND PURPOSE

The Wilderness Act of 1964 established the National Wilderness Preservation System to be administered “for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness...” *Public Law 88-577; 16 U.S.C. § 1131(a)*. Additionally, the National Park Service (NPS) Organic Act of 1916 (*54 U.S.C. § 100101(a)*) requires the NPS to “promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units, which purpose is to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”

Commercial services play an important role in providing opportunities for use and enjoyment of our national parks, including wilderness areas. Commercial services may be of particular importance to park visitors who do not have the knowledge, skills, abilities, or equipment to engage in a wilderness experience safely and confidently on their own without additional support.

The Wilderness Act and wilderness case law clearly establish that wilderness managers must determine the extent to which commercial services are necessary in wilderness. Park managers may take slightly different approaches to the extent necessary determination (END) process depending on specific park needs or in the event of unique legislative mandates. However, in all cases, the fundamental purposes of preserving wilderness character and values should be the primary focus.

The purpose of this guidance document is to outline a general framework that can be used to assist parks in the commercial services decision-making process. This guidance document is not intended to address commercial activities in wilderness that may qualify as prior existing rights. Park units should consult with the Office of Solicitor on questions regarding the management of such activities.

SECTION 2: APPLICABLE LAWS AND POLICIES

The Wilderness Act of 1964 ([*Public Law 88-577, 16 U.S.C. §§ 1131-1136*](#))

Section 4(c) of the Wilderness Act states “ Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such

area.” *Section 4(d)* of the Act sets forth some narrow exceptions to the general prohibitions contained in *Section 4(c)*. Specifically, regarding commercial activities, *Section 4(d)(5)* of the Wilderness Act states, “Commercial services may be performed within the wilderness areas designated by this Act to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.” The “purposes” referred to in *Section 4(d)(5)* are those enumerated in *Section 4(b)*, which states “...wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.”

The Wilderness Act does not define the term “commercial service.” For a definition of “commercial service” and a discussion of what constitutes a commercial service (including examples of special situations which are not deemed commercial services) see Appendix A.

Concessions Management Improvement Act of 1998 ([Public Law 105-391, 54 U.S.C. §§ 101911-101926](#))

To qualify as a commercial service, the activity must meet the standards of the 1998 Concessions Management Improvement Act. NPS Management Policies state that a decision to authorize a commercial service in a park will be based on the determination that the service is 1) consistent with the park’s enabling legislation, 2) is complementary to a park’s mission and visitor service objectives, 3) is necessary and appropriate for the public use and enjoyment of the park in which it is located, 4) is not, and cannot be, provided outside park boundaries, and 5) will not cause unacceptable impacts.

[NPS Management Policies, Chapter 6](#)

Management Policies 2006, § 6.4.4 Commercial Services states that “Wilderness oriented commercial services that contribute to public education and visitor enjoyment of wilderness values or provide opportunities for primitive and unconfined types of recreation may be authorized if they meet the “necessary and appropriate” tests of the National Park Service Concessions Management Improvement Act of 1998), and the Wilderness Act, and if they are consistent with the wilderness management objectives contained in the park’s wilderness stewardship plan. Activities such as guide services for outfitted horseback, hiking, mountain climbing, or river trips and similar activities may be appropriate and may be authorized if conducted under terms and conditions outlined in the park’s wilderness stewardship plan and/or in legislation authorizing these types of commercial use.”

In addition to the criteria set forth in *Management Policies* above, permitted commercial services must adhere to the minimum requirement concept in all aspects of their operations (*Management Policies 2006, § 6.3.5 and 6.4.4*). The only structures or facilities used in support of such commercial services that are allowed in wilderness are temporary shelters, such as tents, which must be removed from the wilderness after each trip unless exceptions are clearly identified in the

park's Wilderness Stewardship Plan. There may also be specific exceptions to this policy identified within individual park wilderness enabling legislation. Additionally, parks and units in Alaska should refer to specific requirements under the Alaska National Interest Lands Conservation Act (ANILCA).

SECTION 3: PROCESS FRAMEWORK

Managers and decision-makers should begin with a determination of whether the fundamental activity that would be commercially supported is appropriate in the park and in wilderness. If the activity is appropriate in wilderness, consider whether the activity should be provided by a commercial service (e.g., a Commercial Use Authorization, or as an element of a concessions contract). Last, if it is necessary to provide the activity commercially, determine to what extent it is necessary (the amount of commercial service, or the capacity for that commercial service). This analysis could occur in a comprehensive planning effort, for instance, in a Wilderness Stewardship Plan. The analysis could occur as a part of a Commercial Services Plan; however, managers must ensure that the analysis includes the necessary wilderness elements and considers all user groups (not solely commercial services users), especially regarding capacity and determining allocations between commercial and non-commercial users. This analysis could also occur on a smaller scale, for example, the case-by-case review of a request to conduct a particular commercial service in wilderness.

The END should be prepared by staff members with knowledge and experience appropriate to the issues. These subject matter experts should use an interdisciplinary team (IDT) approach in defining and determining the appropriate activities, the necessity for commercial services to support those activities, and the extent (i.e., amount) of commercial services necessary. This approach must be highly interactive, and include discussions between park subject matter experts, specialists from other NPS offices, and senior park leadership.

Parks may wish to use non-agency individuals to provide additional insights. It is recognized that the park staff may be small and that subject matter experts may be restricted to only one or two individuals. The need for an IDT does not mean that a large group of specialists must be assembled for every aspect of the END. What it means is that the one or two specialists should be consulting with several sources, agency staff (including concessions management, natural resource management, Solicitors Office, etc.), and non-agency individuals as needed to make sound and well-reasoned decisions.

The IDT used to create the END should be seen as comparable to the National Environmental Policy Act (NEPA) interdisciplinary process (NEPA: *Public Law 91-190*); Council on Environmental Quality (*40 C.F.R. 1502.6*). The END document is then incorporated into a comprehensive Wilderness Stewardship Plan or comparable planning document. The [Commercial](#)

[Services tile](#) on the NPS Wilderness Stewardship Program SharePoint Site provides examples of completed extent-necessary determinations.

Defining the Commercial Activity: The first step in this process is defining the fundamental activity being considered for commercial services. As an example, for a commercial rafting enterprise, the basic activity is river rafting. Consider initially the fundamental *activity* and is it appropriate in wilderness without regard to whether it is commercial or non-commercial in nature. Next determine if there is a need for a commercial service to support the activity. See Appendix B, *Guidance for Determination of Extent Necessary for Commercial Services in Wilderness - Flowchart*. The flowchart has a blue section that describes a process to determine if the activity is proper and the commercial service necessary; an orange section that frames a discussion on capacity and a yellow section that assists with allocation of commercial services to non-commercial opportunities. Allocation of commercial services could also be represented in a planning process (i.e., NEPA).

SECTION 4: IS THE ACTIVITY PROPER FOR REALIZING A WILDERNESS PURPOSE?

Section 4(d)(5) authorizes commercial services that are “proper” for realizing wilderness purposes. Proper means “marked by suitability, rightness, or appropriateness.”¹ A determination on whether an activity is proper or appropriate for realizing a wilderness purpose is best informed by answering a series of questions about the activity. Questions to consider when determining whether an activity is proper and appropriate in wilderness include:

- ***Is the activity consistent with laws, policies, and regulations?*** Common wilderness and non-wilderness outdoor activities include rock climbing, photography, horseback riding, and overnight camping, to name a few. However, other activities are banned in wilderness by law, regulation, or policy. Examples of prohibited activities include mountain biking, hang gliding (aircraft delivery), and motorboat use². Management policies or management plans may also indicate that certain activities are inconsistent with park management objectives for wilderness areas. See *Management Policies*, Section 6.4.3, for guidelines on wilderness recreational use.
- ***Is the activity consistent with the purpose and significance of the park?*** Consult enabling legislation for the park and wilderness area and other relevant legislation. Park specific guidance includes general management plans, wilderness stewardship plans, commercial services plans, foundation documents, and other applicable documents.
- ***Does the activity impact park resources or values?*** Specific resource protection concerns

¹ <http://www.merriam-webster.com/dictionary/proper>

² Note that Congress has authorized motorboat use in some wilderness areas. Check the legislation for your wilderness area.

may dictate that an activity is inappropriate; a simple example is rock climbing in critical nesting areas. As another example, stock use may be inappropriate in sensitive high-alpine meadows.

- ***Does the activity fulfill one of the purposes (recreational, scenic, scientific, educational, conservation, or historic) of wilderness?*** Activities provided by a commercial service must fulfill one or more of the purposes of wilderness, as stated in the Wilderness Act. Appendix C, *Wilderness Purposes and Examples*, explains this issue in detail.
- ***Is the activity compatible with desired conditions for wilderness character?*** Wilderness recreational activities – whether commercial or non-commercial in nature – should not degrade or diminish wilderness character. It is not necessary that the activity *enhance* wilderness character, but it is important that the activity not negatively affect or degrade wilderness character. The *activity* should be closely analyzed for its effect on wilderness character; the *commercial nature* of the activity should not be a factor when looking at the effect on character. Commercial activities should be free from unnecessary attributes (for instance, advertisements such as signs, placards, or banners) which could have additional impact on wilderness character.

The answers to these questions will assist you in determining if the activity is appropriate in wilderness or not. The answers are not necessarily a yes or no decision but considerations within the totality of the decision-making process. If the activity in question is appropriate in wilderness, the next step is to consider whether it is necessary to provide the activity commercially.

SECTION 5: ARE COMEMRCIAL SERVICES NECESSARY TO SUPPORT THE ACTIVITY?

In *High Sierra Hikers v. Blackwell* 390 F.3d 630 (9th Circuit, 2004) the Ninth Circuit Court of Appeals issued a ruling setting forth the criteria that must be satisfied before a wilderness manager can authorize commercial services under Section 4(d)(6) of the Act³. The Court examined the specific language of Section 4(d)(6) and in particular the language stating that commercial services may only be authorized “to the extent necessary.” According to the Court, Section 4(d)(6) requires wilderness managers to make a “specialized” finding of “necessity” before authorizing commercial services in wilderness. In this specialized finding, the agency must also “show that the number of permits [or other authorizations] granted was no more than was necessary to achieve the goals of the Act.” This step and the following one are designed to help wilderness

³ Decisions issued by the U.S. Court of Appeals for the Ninth Circuit are binding within the Ninth Circuit which includes the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. Approximately 80 percent of designated wilderness is located in these states. Other circuits have not yet issued rulings interpreting Section 4(d)(6). Because the majority of wilderness is located within states where opinions of the Ninth Circuit are binding, this framework is designed to help parks comply with the Ninth Circuit’s decision.

managers meet the requirements of Section 4(d)(5) as interpreted by the Appeals Court.

Determine if the activity – which has been deemed “proper” for realizing one or more wilderness purposes under preceding steps – should be provided commercially. In the *High Sierra Hikers* opinion, the Court of Appeals found that because the Wilderness Act was written in broad terms and allows for some balancing of competing goals, an agency determination that commercial services were needed to provide access to those people who would otherwise not be able to gain access for themselves or their gear could support a finding of necessity.

However, the *necessity* for commercial support services should not be confused with visitors’ *desire* for commercial support when conducting the activity. With this guidance in mind, the following criteria and questions should be considered.

- ***When answering the necessity question, thoughtful consideration must be given to the visitor experience in the wilderness.*** Managers must address basic questions about the visitors’ wilderness experience, and what opportunities will be available to them. The availability – or unavailability – of a commercial service may have profound impact on the experience a visitor may be afforded in wilderness.
- ***Does the commercial service significantly contribute to visitor understanding and appreciation of the park’s purpose in general and wilderness in particular?***
- ***Are specialized skills, knowledge or equipment required or highly advised?*** Deciding on the availability of commercial services ultimately determines which wilderness opportunities may be available to certain wilderness users. Users who don’t have the specialized equipment may not be able to participate in the activity without using a commercial service provider. Users who do not possess skills or knowledge required by an activity (such as white-water rafting, or horse-packing) may only be able to experience an activity with a commercial service provider.
- ***Are introductory experiences appropriate?*** Similar specialized skills or knowledge, access to introductory experiences with a commercial provider may be appropriate.
- ***Are special conditions or controls warranted to protect resources, or even the visitors themselves?*** Special resource concerns may play into the decision to provide an activity through a commercial service. There may be a need to protect sensitive resource by allowing certain activities to occur only with a controlled and regulated commercial provider.
- ***Is the service an essential service that is not available within a reasonable distance from the park?*** When analyzing necessity, managers should be cautious about looking to opportunities for the commercial services outside of wilderness to meet visitor experience needs. The mere fact that visitors could engage in a commercially provided activity outside of wilderness should not be reason alone to conclude that the service is not necessary in wilderness. Wilderness areas are unique and often one-of-a-kind experiences.

In summary, when analyzing the necessity for commercial services, the visitor experience must be considered. Park managers must address what types of opportunities will be made available to the visitor. Should visitors without specialized skills or equipment be given an opportunity to experience an appropriate activity with a commercial provider? Should visitors be afforded an opportunity for an introductory experience in wilderness with a commercial provider? Should visitors be required to experience certain activities with a commercial provider or guide, to achieve specific resource protection measures? Many of the factors you should consider in this guidance do not lead to a yes or no decision but are pieces in the complex decision you must make.

SECTION 6: TO WHAT EXTENT ARE COMMERCIAL SERVICES NECESSARY?

If it is determined that the activity is proper for realizing a wilderness purpose and should be provided commercially, the next step is to determine the extent (or amount) of commercial services that are necessary. The word “necessary” need not be interpreted as meaning absolutely necessary or essential⁴. Rather, it is permissible to interpret the word “necessary” as meaning reasonably useful or appropriate to achieve the desired goals, which in this case is the realization of wilderness purposes. Because this step requires managers to identify the number of commercial services that will be allowed, managers will need to understand the area’s capacity to support recreational uses while preserving wilderness character. To determine an extent or number of commercial services, managers should ideally determine the visitor capacity to allocate use (commercial and non-commercial). Once capacity is determined, the following considerations must be given to how this capacity will be allocated:

- ***If use is not near capacity, managers must determine the appropriate number of commercial services relative to non-commercial opportunities.*** This can be done through a visitor capacity study, current use, or establishing threshold’s that would trigger further analysis.
- ***If use is at or near capacity, use allocations could be redistributed between commercial and non-commercial users, or determined that no commercial service is necessary.*** *Director’s Order 41* states that “wilderness areas at, or near, visitor capacity may not be able to accommodate any commercial services either at all or during peak capacity periods.” However, if there are compelling reasons for commercial services to support proper activities, non-commercial allocations could be adjusted to allow for a necessary amount of commercial service allocation. There may be occasions when managers make allocation decisions without a visitor capacity study. Managers may, for example, need to determine commercial services allocations (extent) for a wilderness area with extremely low visitor use and no known impacts to wilderness character or wilderness resources.

⁴ *Wilderness Watch v. U.S. Fish and Wildlife Service*, 629 F.3d. 1024 (9th Cir. 2010) (interpreting the word “necessary” in Section 4(c) of the Wilderness Act to mean less than absolutely necessary).

In circumstances where use is not impacting wilderness character and there are no established visitor capacity data available, it may be acceptable and appropriate to set sufficiently low allocations and to implement a monitoring program to assess developing impacts to wilderness character. If impacts to wilderness character begin to appear, then managers would respond by either reducing commercial services allocations, adjusting overall use levels, establishing visitor capacities, or taking other necessary measures to ensure that wilderness character is preserved (adaptive management).

Consideration should be given to the potential long-term and short-term impact use may have on each quality of wilderness character, with an indication of whether such use would degrade, maintain, or improve each quality of wilderness character. Wilderness character measures can be used to monitor the condition of wilderness qualities affected by commercial use⁵.

Ultimately, the extent or number of commercial services is a management determination of the quantity which is reasonably necessary and appropriate to achieve the desired goals of the wilderness area, which in this case is the realization of wilderness purposes.

SECTION 7: DETERMINING CAPACITY

There are several methods to determine capacity. Parks must determine what method fits the needs of that area. For more information on capacity and determining capacity see *Management Policies 2006*, section 8.1.1, as well as *The Visitor Experience and Resource Protection (VERP) Framework: A Handbook for Planners and Managers*. See also *Numerical Visitor Capacity: A Guide to Its Use in Wilderness*, USFS General Technical Report RMRS-GTR- 247, by David Cole and Thomas Carlson. Or the Interagency Visitor Use Management Council position paper on *Visitor Use Management*.

SECTION 8: MONITORING

Visitor use - both commercial and non-commercial - should not degrade wilderness character and should preserve opportunities for solitude and primitive and unconfined recreation (see *Keeping It Wild in the National Park Service, January 2014* and the *NPS Wilderness Character Monitoring Technical Guide, 2023*). Monitoring to preserve or enhance wilderness character should include monitoring use levels and the impacts of both commercial and non-commercial users. Managers must respond to inappropriate or unacceptable impacts resulting from use levels or types of user allocations through adaptive management.

⁵ How to determine wilderness character – see *User Guide to Integrating Wilderness Character in Park Planning, Management and Monitoring*.

SECTION 9: PLANNING AND NEPA

How do ENDs fit with planning? Several different types of planning processes could include the determination of the extent necessary for commercial services in wilderness, including general management plans, wilderness stewardship plans, and commercial service plans. Making this determination within a planning framework includes an analysis of impacts and public involvement. Zoning can be completed as part of these plans to (generally) define the types and amounts of use, as well as other designations intended to preserve wilderness character. Through the creation of zones, commercial use in different portions of a wilderness can be managed in a different manner.

Maintaining wilderness character identified in zoning should be a key element in the evaluation of a proposed commercial service.

Managers should thoroughly consider how the commercial services END is addressed in plans with multiple alternatives. Depending on differences in the objectives for visitor use that are expressed in the plan alternatives, potentially both the rationale for the need for the commercial service(s), and the amount or extent of commercial services may vary across alternatives. Therefore, plans which propose different levels or types of commercial services should develop the analysis or work through the process for each alternative in order to allow for thorough analysis and more complete public notification and engagement. Plans which propose one level of commercial service across all alternatives may allow for a single extent analysis in the preferred alternative. Park managers may need to consult with regional concessions staff, NEPA and planning specialists, and regional solicitors when developing draft alternatives and the corresponding END.

Documenting the END Decision: The final decision regarding the extent necessary of commercial services should be appropriately documented. In a comprehensive planning effort, such as a wilderness stewardship plans or commercial services plans, the decision should be captured in a Finding of No Significant Impact (FONSI) or Record of Decision (ROD). If not part of a more comprehensive planning process, the decision should be recorded in a detailed document outlining the analysis, decisions made and the rationale for those decisions, and the actual allocations. See Appendix D, *Extent Necessary Determination Decision Document Template*. As for all important administrative decisions, maintaining an accurate administrative record of the decision-making process is crucial.

SECTION 10: APPLYING THE MINIMUM REQUIREMENT CONCEPT

NPS Management Policies, 2006, 6.4.4 requires the application of the minimum requirement concept to the operating plans of commercial services providers who operate in wilderness. When commercial services operating plans are formulated, activities and methods which have the least

amount of negative effect on wilderness character should be considered. Commercial services in wilderness, when authorized, must be managed according to the minimum requirements concept, and the commercial activity should have the least amount of impact on wilderness character. Commercial activities in wilderness should be free from unnecessary attributes and should have no more impact than an equivalent non-commercial activity.

APPENDIX A: COMMERCIAL SERVICES

The Wilderness Act does not define the terms “commercial enterprise” or “commercial service.” When Congress has failed to include definitions of important terms in a statute, agencies may rely on commonly accepted definitions. The word “commercial” is commonly defined as (1) “[o]f or relating to commerce,” *i.e.*, “[t]he buying and selling of goods, esp. on a large scale: business,” (2) “[e]ngaged in commerce,” (3) “[i]nvolved in work designed or planned for the mass market,” or (4) “[h]aving profit as a primary aim.”⁶ The word “service” is commonly defined as, “the organized system of apparatus, appliances, employees, etc., for supplying some accommodation required by the public” or “the performance of any duties or work for another; helpful or professional activity.”⁷ Activities that are necessary and proper for realizing wilderness purposes will be evaluated to determine whether they are commercial services.

A commercial enterprise is any use or activity undertaken within wilderness for one or more of the following purposes:

- Sale of products or services (e.g., a restaurant or other vendor conducting business within wilderness);
- Extraction of resources, consumptive use of resources, or manipulation of resources for the purposes of generating funds or revenue (e.g., timber harvesting, fishing, grazing, mining, or mineral exploration); or,
- An activity where an entry or participation fee is charged (e.g., a concert or other ticketed gathering or a paid guiding service).

The term commercial enterprise does not include commercial filming or photography.

A commercial service is a commercial enterprise that provides a service for hire to one or more clients where the paid service occurs within wilderness. The primary purpose of a commercial service is to experience wilderness through support provided for a fee or charge and the primary effect is that the wilderness experience is guided and shaped through the use of support services. For example, a paid guiding or outfitting service may be a commercial service. Commercial filming and photography are not a commercial service.

Filming and photography, whether or not they are performed for commercial purposes, are not commercial services, though applications for permits to perform such activities are subject to a minimum requirements analysis. See *Reference Manual 41: Procedures for Managing Filming and Photography in NPS Wilderness*.

⁶ Webster’s II New College Dictionary 225 (1995); *accord* Merriam-Webster’s Collegiate Dictionary 230 (2000). See *Wilderness Society v. U.S. Fish and Wildlife Service*, 353 F.3d. 1051, 1061 (9th Cir. 2003).

⁷ www.dictionary.com

The form of the organization providing the service is also not dispositive of whether the organization is offering a commercial service, for example whether it is a non-profit or not-for-profit. Rather, the definitions above, including an analysis of the activity's purpose and effect, will guide a determination of whether a service is commercial or not.

Commercial services may be authorized under a number of different legal authorities, using a number of different instruments. These include concession contracts, commercial use authorizations, and special use permits.

1. Authorization Mechanisms for Commercial Services

a. *Concessions Contracts and Commercial Use Authorizations:*

Services authorized under concessions contracts and commercial use authorizations are considered commercial services because the entities holding these authorizations are businesses engaged in commerce, they provide a service to the public, members of the public who use these services experience wilderness directly as a result of this commercial support, and employees of the concessioner and CUA holder direct and guide the wilderness experience of the trip participants.

b. *Special Use Permits:*

Special Use Permits are used to authorize a wide range of activities, many of which are not commercial. Because Special Use Permits are issued on a case-by-case basis, it is not possible to evaluate all of the different activities that might be requested in a special use permit in advance. When a request for a Special Use Permit in wilderness is received, it will be evaluated in accordance with the criteria above to determine whether the activity constitutes a commercial service.

2. Special Situations

For the majority of traditional wilderness outfitting and guide services the determination of commerciality is straightforward. The commerciality of some uses is not as clear, however, and those uses are analyzed here.

a. *Scientific Research:*

Scientific research performed by faculty, postdoctoral fellows, or students enrolled in degree-granting programs in accredited colleges and universities or holding appointments with governmental agencies or scientific research institutions, even when accompanied by pack stock support, will typically not be considered commercial. Research trips using pack stock support would normally not be classified as a commercial service trip because the primary purpose and effect of the trip is the enhancement of scientific understanding of park resources,

not commercial interests. The NPS will review requests for scientific research permits that involve the support of commercial outfitters to determine whether the trip is commercial. In the event that a research trip is categorized as a commercial service, it should only be authorized if it comports with the park's extent necessary determination (END).⁸

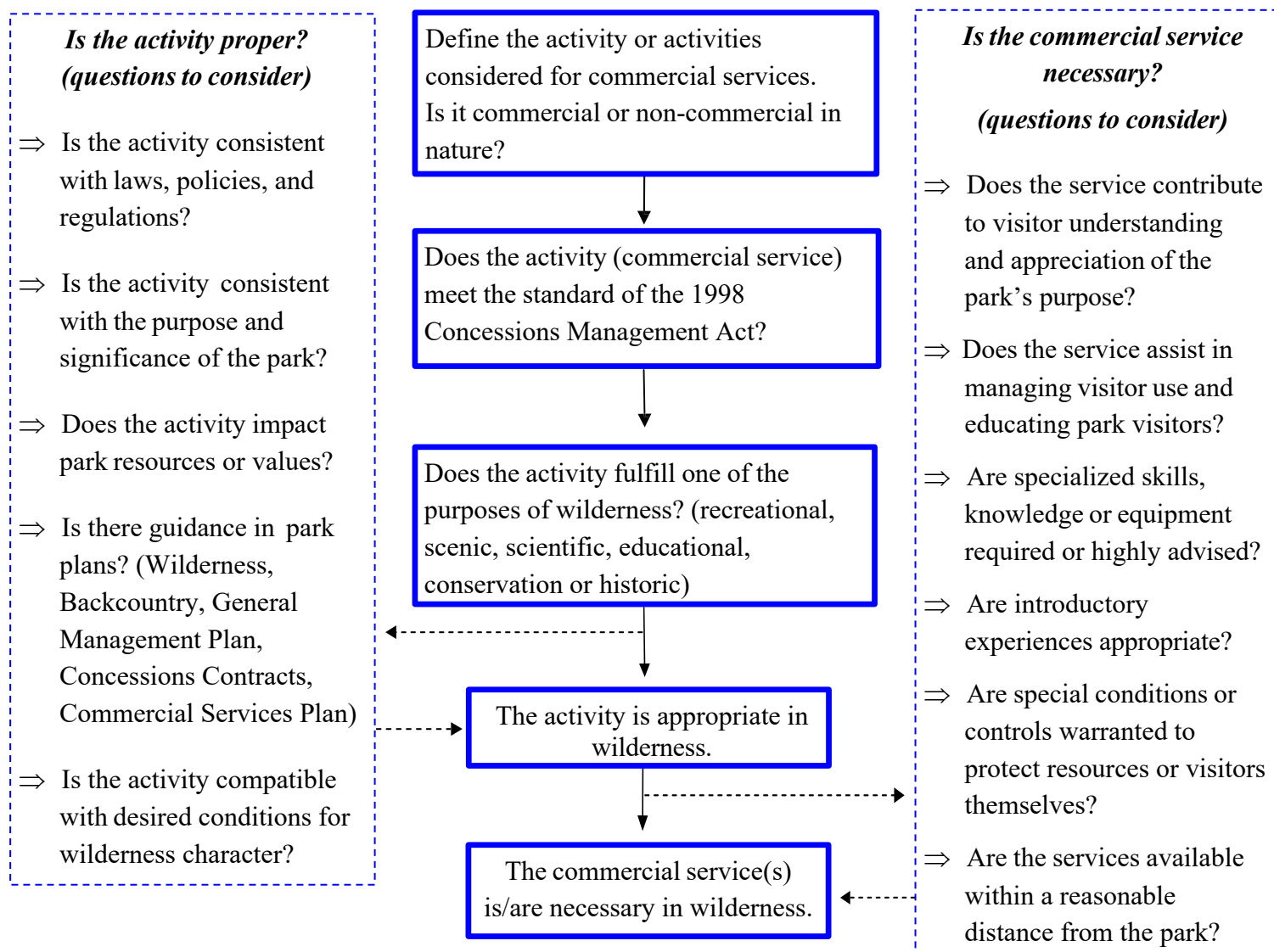
b. *Trips by Educational Institutions:*

Each year, parks receive requests for wilderness trips by student groups from accredited educational institutions conducting classes for course credit. These institutions range from elementary, middle, and high schools to colleges and universities. The goal of these trips is to provide environmental education to students and to foster self-reliance and other qualities. In some cases, employees of the educational institution guide the trip. In others, the school retains the services of an institution with expertise in environmental education. Trips by accredited academic institutions that provide course credit for completion, even if accompanied by a hired guide or instructor, are not considered commercial services for the purposes of the END. The primary purpose and effect of these trips is fulfilling academic goals for the students involved. The students' experience is guided and shaped by the institution's academic goals. Support services from guides or environmental education organizations do not change the essential character of the trip, which is academic not commercial.

⁸ Some scientific research could involve a commercial component if it contained an element of "bioprospecting." Any such proposals will be reviewed for legality under the Wilderness Act and commerciality under the guidelines noted above.

APPENDIX B: EXTENT NECESSARY DETERMINATION FLOWCHART

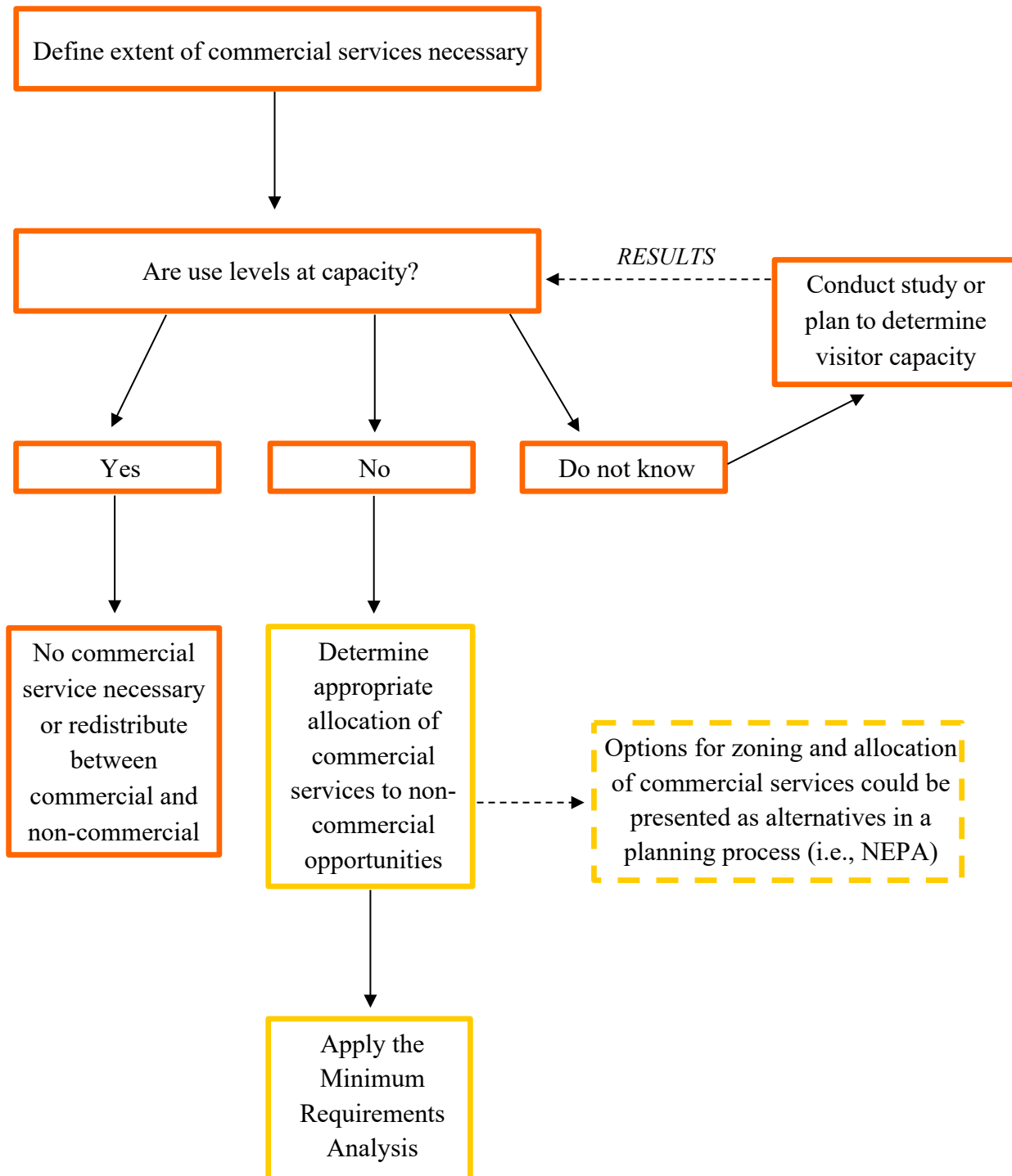
Flowchart Part 1 of 2



If the activity is both appropriate in wilderness and the commercial service(s) is/are necessary in wilderness: **CONTINUE** to the next page for Part 2 of the Flowchart.

Flowchart Part 2 of 2

Activities that are both appropriate in wilderness and the commercial service(s) is/are necessary in wilderness should continue into this part of the flowchart.



APPENDIX C: WILDERNESS PURPOSES AND EXAMPLES

Recreational Purposes

NPS Management Policies require recreational use in NPS wilderness areas are of a nature that:

- enables the areas to retain their primeval character and influence;
- protects and preserves natural conditions;
- leaves the imprint of man's work substantially unnoticeable;
- provides outstanding opportunities for solitude or primitive and unconfined types of recreation; and
- preserves wilderness in an unimpaired condition.

Hiking, backpacking, canyoneering, photography, stock use, rock climbing, river trips, and nature study are examples of activities traditionally associated with appropriate wilderness recreation. A use or related activity must be restricted or prohibited when its occurrence, continuation, or expansion would result in unacceptable impacts to wilderness resources or character. A finding that a proposed wilderness use is appropriate does not automatically translate to the need for a commercial service to provide that activity.

Parks utilize public processes to complete Wilderness Stewardship Plans and/or Commercial Services analysis to determine if a proposed commercial service is necessary to fulfill a wilderness purpose and the extent necessary of that service. The United States Court of Appeals for the Ninth Circuit recognized wilderness managing agencies are charged with diverse and sometimes conflicting mandates under the Act.

Commercial Services Analysis for Black Canyon of the Gunnison National Park

The Commercial Services Analysis (END) for Black Canyon of the Gunnison National Park was completed for both the inner canyon and uplands wilderness areas of the park. The END concluded that no commercial services are necessary or appropriate for the inner canyon. Park visitors are already fully utilizing the available permits for access into the inner canyon wilderness without guides and outfitters to kayak or climb. The END noted that introducing commercial services would diminish general public recreational activities and reduce opportunities for “challenge, self-reliance, and adventure that are integral to the wilderness character of the inner canyon...”

In contrast to the findings for Black Canyon's inner canyon wilderness, the END concluded that commercial service provision of guided hiking, camping and educational tours are appropriate in the uplands wilderness areas of the park. The END notes that these uses

would “protect and enhance the desired wilderness character of this zone...and could foster new opportunities for visitors with limited wilderness experience.”

The Black Canyon END also provides an example of cooperating on wilderness commercial services with other agencies. The BLM issues commercial use authorizations for guided rafting, float fishing and hiking/fishing trips for the adjacent Gunnison Gorge Wilderness area that often stage on wilderness designated NPS land.

Commercial Services Evaluation for the Isle Royale Wilderness

A 2011 Commercial Services Evaluation for the Isle Royale Wilderness concluded that commercial kayak guides provide an activity which is proper for realizing the recreational purposes of the area. The Evaluation determined that three guide services providing a total of 4 trips each year for a total of 12 people was the minimum extent necessary.

Scenic Purpose

Appreciation of wilderness scenery is a readily available and important aspect of almost any visit to wilderness. Although the scenic purpose of wilderness can largely be realized simply by visiting a wilderness, commercial services can play a role in helping visitors understand the key distinction that the wilderness scenery they are viewing is natural and untrammeled. Wilderness managers may want to consider commercially provided painting, writing, photography, or similar workshops to provide a structured environment for learning about the wilderness behind the scenery.

Scientific Research Purposes

The natural and untrammeled qualities of wilderness provide unique opportunities to conduct scientific research. Researchers may rely on commercial services to provide logistical support. NPS must review requests for scientific research permits that involve the support of commercial services to ensure impacts to wilderness character have been evaluated.

See [*An Interagency Framework to Evaluate Proposals for Scientific Activities in Wilderness* \(2010\)](#), and the NPS White Paper [*Scientific Activities and Research in NPS Wilderness: Guidelines for Wilderness Managers* \(2011\)](#).

Educational Purpose

Wilderness provides an unparalleled classroom for coursework on wilderness values, ethics and philosophy and wilderness ecology. Some education programs are specifically designed to use wilderness to teach self-reliance, survival, adaptability or problem-solving skills. Other wilderness-based courses focus on “how to” topics such as wilderness first aid, rock climbing

or backcountry skiing. Often the sponsors of the courses are fully accredited institutions offering course credit. Additionally, in order to realize the educational purpose of wilderness, managers may consider allowing commercial education programs, but only after completing the END.

Conservation Purpose

Activities such as ecological restoration projects, trail maintenance or endangered species monitoring are examples of conservation actions that help realize the conservation purpose of wilderness. These activities are generally completed as part of the proper administration of the wilderness by the agency or under contract and are not considered a commercial service.

Historic Purpose

“Historic uses” are usually defined as those uses which emphasize the wild, untrammeled, and natural character of the land in its historic state. Visitors help to realize the historic purpose when they encounter the land as did those of earlier historical periods. The historic purpose is realized by maintaining the wilderness character of the land, by primitive recreation in the wilderness, by the provision of opportunities for solitude, by perceiving and enjoying features of historical value, and by enjoying the scenic wonders of the natural and untrammeled landscape. The realization of this purpose is consistent with the realization of the conservation, historical and recreational purposes.

The courts that have directly addressed the meaning of “historic uses” as used in the Wilderness Act, have construed “historic use” to mean use of the primeval or ancient wilderness in its natural state. The United States Court of Appeals for the Eleventh Circuit found that “the only reasonable reading of “historical use” in the Wilderness Act refers to experiencing the natural, rather than manmade, features.”⁹ This decision was followed by the district court in Olympic Park v. Mainella, which noted that:

The National Park Service references the historic pattern of shelter construction and recreational use in concluding that the “setting, association, and feeling are significant aspects of historic use within the park”, but while this may be true, this type of usage is in the past and a new value has been placed on the land by the creation of the Olympic Wilderness. ...a different “feeling” of wilderness is sought to be preserved for future generations to enjoy, a place “where the earth and its community of life are untrammeled by man” and which retains “its primitive character and influence.”¹⁰

⁹ *Wilderness Watch v. Mainella*, 375 F. 3d 1085 (11th Cir. 2004)

¹⁰ *Olympic Park Associates v. Mainella*, 2005 WL 1871114 (D.Wash. 2005)

Thus, “historic use” refers to preserving the wilderness character of the land so that each visitor may encounter it in its historic state, with the unique qualities identified either as part of a wilderness character assessment, the specific wilderness enabling legislation, or other appropriate documentation. These qualities will vary from one wilderness area to another. For many, this historic state will be as undeveloped as it was when the first humans experienced it.

APPENDIX D: EXTENT NECESSARY DECISION DOCUMENT TEMPLATE

WILDERNESS ACT EXTENT NECESSARY DETERMINATION FOR COMMERCIAL SERVICES IN (insert name) WILDERNESS

Introduction

The purpose of this document is to determine the extent to which commercial services are necessary in the (insert name of wilderness) to realize the purposes for which the (insert name of wilderness area) was established.

The assessment begins with a review of law, policy, and regulation to bring forth the criteria that will be used to measure the extent that commercial services are both necessary and appropriate in (wilderness area). Following a listing of these criteria, descriptions of the wilderness characteristics relative to the criteria are presented. This determination then identifies those activities that are necessary and proper for realizing the recreational and other authorized purposes of wilderness. Commercial services to support proper activities are evaluated in terms of their ability to preserve wilderness character and achieve desired conditions for wilderness. Finally, any other agency-specific analyses or requirements relative to wilderness planning and commercial services are also added to this decision-making process. The assessment includes with a finding of the amount of commercial services that is necessary and may be provided (under each alternative).

The Wilderness Act and NPS Wilderness Policies

The Wilderness Act of 1964 secured for our nation an enduring resource of wilderness. Wilderness areas included in the National Wilderness Preservation System are to be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness. The wilderness character of these areas is to be preserved.

In order to achieve these goals, the Wilderness Act includes a series of prohibitions related to particular activities. These prohibitions relate to mining, road construction, motorized equipment, landing of aircraft, installation of structures, and commercial services. With regard to commercial services in wilderness, Section 4(d)(5) of the Wilderness Act states, “Commercial services may be performed within the wilderness areas designated by this Act to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.” The “purposes” referred to in Section 4(d)(5) are those purposes enumerated in Section 4(b). Section 4(b) provides that “...wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.”

In addition to the Wilderness Act, the NPS’s management of wilderness areas is guided by the NPS *Management Policies 2006* (§ 6.4.4) and Director’s Order # 41. The Management Policies state that commercial services like guiding that “...contribute to public education and visitor enjoyment of wilderness values or provide opportunities for primitive and unconfined types of recreation may be authorized if they meet the “necessary and appropriate” tests of the National Park Service Concessions Management Improvement Act of 1998 and section 4(d)(5) of the Wilderness Act..., and if they are consistent with the wilderness management objectives contained in the park’s wilderness stewardship plan, including the application of the minimum requirement concept.” The application of the “minimum requirement” concept to commercial services is reemphasized in Director’s Order 41. Director’s Order 41 requires NPS to prepare a documented determination setting forth the types and amounts of commercial services that are necessary to realize wilderness purposes. This extent necessary determination (END) satisfies the requirement in Director’s Order 41. The Director’s Order also provides that allocations between commercial and non-commercial uses should be subject to public comment through a public planning process. This END is being prepared in association with (insert name of planning document).

Definitions of Wilderness Act Terms

The Wilderness Act does not define the terms “activities,” “commercial services,” or “necessary.” When Congress does not include definitions of important terms in a statute, agencies may rely on commonly accepted definitions. The word “activities” is commonly defined as, “a pursuit in which a person is active”¹¹, “a recreational pursuit or pastime”, or “actions taken by a group in order to achieve their aims.”¹² In the wilderness context, it is understood as referring to the recreational or other active pursuits engaged in by wilderness visitors.

A commercial service is a commercial enterprise that provides a service for hire to one or more clients where the paid service occurs within wilderness. The primary purpose of a commercial service is to experience wilderness through support provided for a fee or charge and the primary effect is that the wilderness experience is guided and shaped through the use of support services. For example, a paid guiding or outfitting service may be a commercial service. Commercial filming and photography are not a commercial service.

The word “necessary” is defined in some dictionaries as meaning “absolutely needed.”¹³ Other dictionaries define it to mean “important in order to achieve a specific result, or desired by authority or convention.”¹⁴ The word necessary appears in many federal statutes.

For the purposes of this END, the word necessary in relation to commercial services is defined to

¹¹ Merriam-Webster’s (online)

¹² Oxford Dictionary (online)

¹³ Merriam-Webster’s (online)

¹⁴ Encarta Dictionary (online)

mean a service that is needed to achieve objectives for visitor use and enjoyment of wilderness in such a manner that the desired conditions for wilderness area are achieved, and wilderness character is preserved.

The language of the Act also contains two distinct but interrelated standards related to the terms “activities” and “commercial services.” First, the “activities” that may be supported by commercial services must be “proper for realizing the recreational or other wilderness purposes.” Second, “commercial services” can only be authorized “to the extent” that they are necessary for activities deemed proper. The U.S. Court of Appeals for the Ninth Circuit has concluded that this language requires agencies to make a specialized finding of necessity for commercial services and to determine the minimum amount of commercial use that can be allowed. Thus, both the type (i.e., “proper”) and necessity and amount (i.e., “extent”) of commercial support must be addressed in this END.

The NPS Management Policies state that commercial services like guiding that “...contribute to public education and visitor enjoyment of wilderness values or provide opportunities for primitive and unconfined types of recreation may be authorized if they meet the “necessary and appropriate” tests of the National Park Service Concessions Management Improvement Act of 1998 and section 4(d)(6) of the Wilderness Act...” A general outline of the necessary and appropriate standards are as follows:

Necessary

A service that is necessary accomplishes one or more of the following:

- The service contributes to visitor understanding and appreciation of park purpose and significance.
- The service enhances visitor experiences consistent with park area philosophies.
- The service assists in managing visitor use and educating park visitors.
- The service is an essential service not available within a reasonable distance from the park.

Appropriate

A service that is necessary accomplishes all of the following:

- The service is consistent with the purpose and significance of the park.
- The service is consistent with laws, regulations and policies.
- The service does not significantly impact or impair park resources or values.
- The service does not exclude the public from participating in limited recreational activities.

Note: The finding presented in this section should not differ from that made during the relevant

concession contracting and/or CUA process. Park concession staff should therefore be consulted.

Relationship to the (insert name of associated planning document)

Guidance from Director's Order 41 indicates that an END should be undertaken as part of a larger planning effort. This section of the END is intended to explain the relationship between the END and the associated planning effort. Relevant guidance and information from the plan (e.g., carrying capacity information, desired conditions, visitor use management goals, plan alternatives) should be discussed here.

Purposes for which (insert name of wilderness) was Established

Section 4(d)(6) of the Wilderness Act states, "Commercial services may be performed within the wilderness areas designated by this Act to the extent necessary for activities which are proper for realizing the *recreational or other wilderness purposes of the areas*" (emphasis added.) Section 4(b) of the Act further provides that "...wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use."

The (insert name of wilderness) was established in (insert date) for recreational and other purposes, which include (insert other purposes for affected wilderness area.) *The rest of this discussion should be drawn from relevant legislation and legislative history to determine whether there are any additional purposes that apply to the affected wilderness area. Also review relevant planning documents to see how those purposes have been described and treated previously by the agency.*

DETERMINATION OF EXTENT TO WHICH COMMERCIAL SERVICES ARE NECESSARY IN WILDERNESS

Part 1: Activities that are proper for realizing the recreational or other purposes of wilderness

For a commercial service to be considered as a necessary form of support for an activity, that activity must be proper for realizing wilderness purposes. Any activity that occurs in designated wilderness must first be of a type that does not violate the prohibitions of §4(c) on the use of motor vehicles, motorized equipment or motorboats, the landing of aircraft, or other forms of mechanical transport. NPS Management Policies 6.4.3 states that recreational uses in wilderness will be of a nature that:

- Enables the areas to retain their primeval character and influence;
- Protects and preserves natural conditions;
- Leaves the imprint of man's work substantially unnoticeable;
- Provides outstanding opportunities for solitude or primitive and unconfined types of

- recreation; and
- Preserves wilderness in an unimpaired condition.

In other words, an activity must be subject to sufficient management control so as to preserve wilderness character, which is a fundamental purpose of managing visitor use in a wilderness area. These management controls are outlined and discussed in the activity descriptions below.

Note: This section should also be used to reference any relevant guidance from the associated planning process that informs the process of determining whether a particular activity is appropriate in wilderness. Examples of relevant guidance include wilderness management goals and desired conditions for wilderness.

This section would then include a listing of each activity under consideration (e.g., backpacking, fishing, photography, stock use) and a brief discussion of the following issues: how extensive the activity is, how long it has been ongoing, and any existing restrictions on the activity to control its impacts. For each activity, draw a conclusion as to whether it is appropriate to realize wilderness purposes.

Part 2: Aspects of Wilderness Activities that May Necessitate Commercial Support

The extent to which these forms of commercial service support are necessary depends on a number of factors. Factors that are considered in this analysis include what the parks seeks in terms of self-reliant experiences as opposed to novice or introductory experiences, and the range of social and environmental conditions that can be provided while preserving wilderness character. In the context of wilderness stewardship planning, these objectives for visitor use have been explored through the development of alternatives. Based on the analysis in this END, the alternatives included in the plan incorporate different proposals for no commercial service and others with varying amounts of commercial services that are necessary to achieve desired conditions for wilderness character. This Determination represents a comparative and qualitative analysis of the relevant wilderness factors and determines whether commercial services are necessary and if so, the amount of commercial services that are necessary under each alternative.

To be conducted safely and in a manner that preserves wilderness character, wilderness activities often require specialized skills, knowledge, or equipment. Climbing and mountaineering, for example, involve technical skills that are necessary for ascent and descent, safety practices associated with exposure (e.g., fall hazards) and environmental factors (e.g., mountain weather), and special equipment that is employed for locomotion and safety. Stock packing involves special equipment, such as the stock and tack and skill in loading packs, riding saddle horses, leading pack mules, providing care for the animals, and mitigating stock-related environmental impacts. Wilderness visitors vary in their ability to conduct these more specialized or technical wilderness activities. Therefore, when parks choose to provide opportunities for these types of

visitor activities, some level of commercial support may be necessary.

Specialized Skills or Knowledge

For some wilderness visitors the need for, or lack of, specialized skills or knowledge can be a barrier to engaging in that activity. A commercial service may support a visitor activity by providing or teaching the skills or knowledge that are needed to engage in a proper wilderness activity. This may take the form of guiding, in which the outfitter/guide provides the necessary skills or knowledge to the individual or group that is participating in the activity. It may also take an instructional form, in which the outfitter/guide teaches an individual or group the necessary skills or knowledge so that they may independently participate in the activity in the future. In the latter case, the level of instruction may range from basic or introductory wilderness skills and knowledge to advanced technical skills and knowledge. Guides and instructors are also able to provide local knowledge that can make a wilderness trip safer and more rewarding for visitors who are unfamiliar with a particular wilderness area.

Specialized Equipment or Services

Wilderness activities may require specialized equipment or services that cannot be provided by all wilderness visitors who wish to engage in a particular activity. Regarding specialized equipment, the expense, care, or space required for that equipment may be too great for some wilderness visitors to provide without support from a commercial service provider. Visitors may wish to try out an activity before making the financial commitment to purchase equipment. Some visitor trips may require services, such as the transporting of equipment or supplies that cannot be provided without commercial support. For each activity that has been determined to be proper for the recreational or other purposes of wilderness, we will discuss the specialized equipment or services that may necessitate commercial support.

Special Safety Concerns

Wilderness activities may involve special safety concerns that cannot be managed by all wilderness visitors without commercial support. The NPS does not attempt to eliminate the risks inherent in wilderness travel or in participation in particular wilderness activities. However, for some visitors, a commercial provider may be a necessary means of managing those inherent risks or may be a means to acquire the requisite knowledge to manage those risks independently in the future. For each activity that has been determined to be proper for the recreational or other purposes of wilderness, we will discuss the special safety concerns that may necessitate commercial support.

Special Resource Concerns

Wilderness activities may involve the potential for impacts to wilderness resources. A commercial service provider may be a means to ensure that activities are conducted in appropriate locations and in a manner that mitigates or minimizes resource impacts. For each activity that has been determined to be proper for the recreational or other purposes of

wilderness, we will discuss the special resource concerns that may necessitate commercial support.

Other Contributions that Support Wilderness Purposes

Commercial services most often support wilderness visitors in their recreational activities, but they may also independently or cooperatively support scenic, scientific, educational, historic, or conservation objectives.

Introductory Experiences

Commercial service providers can provide assistance to visitors who lack the experience or confidence to attempt a wilderness adventure on their own. These types of trips can introduce a diverse public to a variety of ways to experience their public wild lands.

Part 3: Types of Commercial Services that are Necessary

Is commercial service necessary. This section also uses the categories provided in Part 2 to analyze the aspects of specific activities from Part 1 that may necessitate commercial support to achieve wilderness purposes. A conclusion regarding the necessity for commercial services is made for each activity. The amount of commercial services that would be allowed is addressed in Part 4.

Note: This section presents, in table format, an analysis of the types of activities that may be supported by commercial services. An example of the table is included at the end of this document.

Part 4: Extent of Commercial Services Determined Necessary for Each Proper Wilderness Activity

This section considers each activity in terms of the wilderness management goals, desired conditions and visitor capacities (*discuss visitor capacities if available*) of each alternative. A determination is reached about the amount of commercial services that would be authorized for each activity. Other mechanisms available for the management of commercially-supported activities are discussed where relevant.

Insert discussion of amount of such commercial services that the agency determines are necessary under each alternative. This discussion involves an analysis of the area's capacity for the types of use under consideration, an allocation between commercial and non-commercial use, and a discussion of how the commercial service amounts proposed are consistent with wilderness character goals that are articulated in each of the plan's alternatives.

MINIMUM REQUIREMENTS ANALYSIS

NPS wilderness policy requires all management decisions affecting wilderness must be consistent with the minimum requirement concept. To meet this requirement a minimum requirement analysis (MRA) will be conducted, and that analysis will be inserted as part of this section or prepare the MRA as a separate but associated document.

(SIGNATURE BLOCKS TO BE ADDED)

Proper Activity Supported by a Commercial Service	
Backpacking and Hiking Trips (with overnight camping and day hiking)	
Reasons that Commercial Support is Necessary for Activity	
Specialized Skills and Knowledge	Wayfinding, orienteering, the use of overnight equipment, campsite selection, food preparation and appropriate food storage in wilderness, wilderness first aid, map reading, sanitation and waste disposal, leadership, and Leave No Trace practices.
Specialized Equipment or Services	Proper use of backpack, cooking equipment, tent, food storage devices, water purification equipment.
Special Safety Concerns	High elevation environment, challenging cross-country areas, orienteering/wayfinding, first aid, creek crossings, mountain weather.
Special Resource Concerns	N/A
Other Contributions that Support Wilderness Purposes	Introductory experiences and guided trips can lead to a better understanding of wilderness character, purposes, and values, and assists the public in being confident to appropriately experience their public lands.
Introductory Experience	Provides people with the necessary skills to engage in self-reliant recreation.
Conclusion	<p>Backpacking and hiking are activities that are proper for realizing the public purposes of wilderness. The skills, equipment and safety issues identified above are barriers that impede the ability of some visitors to realize the values inherent in a wilderness experience. These factors necessitate some level of commercial support for backpacking and hiking. The availability of commercial support may also offer opportunities for introductory wilderness experiences.</p> <p>Allowing commercial support for this activity is consistent with the desired conditions of the WSP. In terms of desired conditions, backpacking and hiking allow visitors to use and enjoy wilderness in a manner that is consistent with the preservation of wilderness, to experience a natural, undeveloped, and untrammeled environment, and to avail themselves of opportunities for solitude or an unconfined recreation experience. The use of commercial support services also helps to achieve the Desired Condition of ensuring that the parks' wilderness resources will be accessible to visitors of diverse backgrounds and capabilities.</p>